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ALEXANDER L. STEVAS,
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80-1460

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

RICHARD SCHWALLIER Petitioner,

v.

UNITED STATES OF AMERICA,
ROBERT L. WALKER, SPECIAL AGENT,
INTERNAL REVENUE SERVICE,
AQUINAS COLLEGE CREDIT UNION.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Richard Schwallier
17161 40th Avenue
Conklin, Michigan 49403
616-949-6600

Petitioner, pro se

QUESTIONS PRESENTED FOR REVIEW

I. THE FOURTH AMENDMENT WARRANT QUESTION

In view of what petitioner will present here, especially §32 of the Act of March 3, 1791, chapter 15, 1 Stat. 199, 207, and §10 of the Act of March 3, 1815, chapter 100, 3 Stat. 239, 241 does 26 USC §7602 violate the Fourth Amendment of the United States Constitution?

II. THE BAD FAITH QUESTION

Can the lower courts ignore an intervenor under 26 USC 7609 who attempts to bring up what amounts to bad faith activities by IRS, pursuant to the standard set up by this Honorable Court in the cases of United States v. LaSalle National Bank, 437 U.S. 298 (1978) and United States v. Powell, 379 U.S. 48 (1964)?

III. THE JURISDICTION QUESTION

Is it proper for the Appellate Court to deny jurisdiction for review of Appellant's appeal?

No.

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NOW COMES Richard Schwallier above named Petitioner, to petition this Honorable Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the 6th Circuit in this case as entered on the 1st of December, 1980.

As grounds Petitioner Schwallier respectfully shows the Court as follows:

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the 6th Circuit has not yet been reported; a copy is set forth in the appendix, page A1. The opinions of the Federal District Courts are unreported and copies of those opinions are also set forth starting on page A3.

JURISDICTION

The Opinion of the Court of Appeals was entered on 1st of December 1980 as a denial of jurisdiction to review the matter.The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1), which confers authority for this Court to review any lower court case upon the petition of any party; and under the United States Constitution, the First Amendment, which acknowledges the right to seek redress of grievances by petitioning the Government.

APPLICABLE LAW

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

26 U.S.C. §7602

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to per-

form the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

26 U.S.C. §7604(a)

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

26 U.S.C. §7609 (b)(1)

(b) Right To Intervene; Right To Stay Compliance.—

(1) Intervention.—Notwithstanding any other law or rule of law, any person who is entitled to notice a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85–508, § 12(e), 72 Stat. 348.

STATEMENT OF THE CASE

1. The United States of America and Robert L. Walker, Special Agent of IRS, Petitioners-Appellees, commenced a "summons" enforcement proceding under 26 USC § 7602 for procurement of ALL documents kept for Appellant Richard Schwallier at Aquinas College Credit Union for the years of 1975 and 1976.

2. Appellant Schwallier upon notification by a party at Aquinas College Credit Union that IRS had issued one of their "summonses" for the procurement of Appellant Schwallier's records, if any, instructed the institution by letter that he would take legal action if any information was given IRS in violation of his Fourth or Fifth Amendment rights. It should be noted that Appellant did NOT at any time suggest that a proper judicial warrant be resisted. As a consequence Aquinas College Credit Union declined to comply with the 4029 "summons" issued by IRS.

3. The government then proceded to petition the Federal District Court under 26 USC§7604 for "summons" enforcement. Such cause was heard by a court magistrate.

4. Appellant intervened at the Show Cause Hearing under 26 USC § 7609 asserting that he had NOT recieved the

the required notification of the issuance of the "summons", and questioning the validity of the "summons" as well as inquiring whether the information produced by it could be used against him in a criminal prosecution. Appellant also asserted that government agents had engaged in what amounted to Bad Faith Activities.

5.The lower court issued an order based on a Magistrate's report requiring Aquinas College Credit Union to comply with the IRS issued "summons".

6.The District Court Clerk refused to accept Appellant Schwallier's motion for a Stay of Complaince due to the fact that no brief was attached as allegedly required by a band new local rule.

7.A timely Appeal was filed with the Sixth Circuit of Appeals.

8.Appellant also filed an unsuccessful motion for a Stay of Complaince with the Sixth Circuit Court of Appeals.

9.The Sixth Circuit Court of Appeals subsequently denied juridsiction to review Appellant's appeal on motion of IRS on grounds of alleged mootness.

10.Appellant Schwallier filed a timely Petition with this Honorable Court.

ARGUMENT I

THE FOURTH AMENDMENT QUESTION

Petitioner Schwallier respectively submits that great error has occured regarding the Fourth Amendment in revenue cases due largely to the fact that this Honorable Court has not taken notice of the search and seizure research cited in this petition as indicated by Shepard's citations for the U.S. thru August, 1980.

The following two enforcement sections (32 and 38) of the 1791 Distilled Spirits Act (Act of March 3, 1791, ch. 15, 1 Stat. 199) clearly show the intent of the First Congress with regard to the requirements of the Fourth Amendment in revenue cases. Additionally the 1815 Internal Revenue Act (Act or March 3, 1815, ch. 100, 3 Stat. 239)sections 10, 13 and 16 make it unequivocally clear that the Fourth Amendment requirements are applicable in all respects, and "to all acts that hereafter may be passed relative to internal duties, as to those heretofore passed and now in force".

§32 of the Act reads:

"That in case of the said spirits shall be fraudulently deposited, hid or concealed in any place whatsoever, with intent to evade the duties thereby imposed upon them, they shall be forfeited. And for the better discovery of any such spirits so fraudulently deposited, hid or concealed, it shall be lawful for any judge of any court of the United States, or either of them, or for any justice of the peace, upon **reasonable cause of suspicion**, to be made out to the satisfaction of such judge or justice, by the **oath or affirmation** of any person or persons, by **special warrant** or **warrants** under their respective hands and seals, to authorize any of the officers of inspection, by day, in the presence of a constable or other officer of the peace, to enter into all and every such place or places in which any of the said spirits shall be suspected to be so fraudulently deposited, hid or concealed, and to seize and carry away any of said spirits which shall be there found so fraudulently deposited, hid or concealed, as forfeited. 1 Stat. at 207 (emphasis added).

§38 of the Act reads:

"That in any prosecution or action which may be brought against any supervisor or other officer of inspection, for any seizure by him made, it shall be necessary for such supervisor or officer to justify himself by making it appear that there was **probable cause** for making the said seizure; upon which, **and not otherwise**, a verdict shall pass in his favour. And in any such action or prosecution, or in any action or prosecution which may be brought against such supervisor or other officer, for irregular or improper conduct in the execution of his duty, **the trial shall be by jury**. And in any action for a seizure, in which a verdict shall pass for such officer, the **jury** shall nevertheless assess reasonable damages for any prejudice or waste (according to the true amount in value thereof) which shall be shown by good proof to have happened to the spirits seized, in consequence of such seizure; and also for the detention of the same, at the rate of six per cent per annum, on the true value of the said spirits at the time of such seizure, from that time to the time of restoration thereof; which shall be paid out of the treasury of the United States; Provided, That no damages shall be assessed when the seizure was made for want of the proper certificate of certificates, or by reason of a refusal to show any officer of inspection, upon his request, the spirits in any entered house, building or place: And provided also, That if it shall appear from the verdict of the jury, that any such prejudice or waste was sustained by the negligence of the officer, he shall be responsible therefor to the United States." 1 Stat. at 208. (emphasis added)

§10 of this Act reads:

"That if any collector or his deputy, shall have **cause to suspect** a concealment of any goods, wares, or merchandise, in respect to which the respective provisions of **the acts imposing an internal duty** thereon have not been complied with, in any **particular** Dwelling-house, store, building, or place, (other than the manufactory in which the same were made.) they, or either or them, shall, upon proper application on **oath** to any justice of the peace, be entitled to a **warrant** to enter such house, store, or place, (in the day time only,) and there to search for such goods; and, if any shall be found, to seize and secure the same for trial." 3 Stat. at 241. (emphasis added)

§13 of this Act contains in relevant part:

"the onus probandi shall be on the claimant only when **probable cause** is shown for such prosecution, to be judged of by the court before whom the prosecution is had." 3 Stat. at 242 (emphasis added).

§16 of this Act reads:

"That the foregoing provisions of this act shall be applicable, in all respects, as well to all acts that may hereafter be passed, relative to internal duties, as to those heretofore passed and now in force." 3 Stat, at 243.

ARGUMENT II

THE BAD FAITH QUESTION

The lower court record will reveal that Petitioner Schwallier acting in pro per as an Intervenor under 26 USC § 7609 attempted to bring up what amounted to bad faith activities by IRS at the "summons" enforcement hearing before a Grand Rapids Magistrate. The allegations were totally ignored and no evidentary hearing for Petitioner's proofs was scheduled.

This Court has by its opinions in United States v. Powell, 379 U.S. 48 (1964) and United States v. LaSalle National Bank, 437 U.S. 298 (1978) set up a bad faith standard. It is meaningless to have such a standard if allegations and proofs of bad faith can, in effect, be ignored or denied. The bad faith standard set up by this Court in the Powell and LaSalle cases, supra, in relevant part follows.

> (from Powell)
> " The IRS must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed--in particular, that the 'Secretary or his delegate,' after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect."
>
> ***
>
> "Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation."
>
> (from LaSalle)
> "(b) To enforce a summons under §7602, the

primary requirement is that it be issued before the IRS recomends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons. This is a prophlactic rule designed to protect the standards of criminal litigation discovery and the role of the gands jury as a principal tool of criminal accusation.

"(c) Enforcement of a summons is also conditioned upon the good-faith use of the summons authority by the IRS, which must not abandon its institutional responsibility to determine and to collect taxes and civil fraud penalties. That a single special agent intends only to gather evidence for a criminal investigation is not dispositive of the good faith of the IRS as an institution. Those resisting enforcement of a summons must disprove the actual existence of a valid tax determination or collection purpose by the IRS."

ARGUMENT III
THE JURISDICTION QUESTION

Petitioner, being agrieved by the procedings at the District Court level, filed a timely appeal in the Appellate Court, pursuant to 28 USCA §1291 for review and remedy. USCA § 1291 states in part, "Final Decisions of District Courts — The Court of Appeals shall have jurisdiction of appeals of all final decisions of the Distirict Courts of the U.S. ..."

The merits of Petitioner Schwallier's brief have not been reviewed by the Appellate Court, such Court having denied jurisdiction to review on the motion of

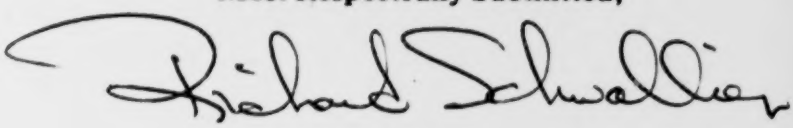
IRS to dismiss for mootness. It should be noted that Petitioner Schwallier attempted unsuccessfully to obtain a timely Stay of Complaince from both the District Court and the Sixth Circuit Court of Appeals. Such circumstances have rendered not only the bad faith standard meaningless but the right to a proper judical review as well.

ARGUMENT CONCLUSION

Petitioner most respectfully submits that it is only because of the fact that this Honorable Court is **NOT** aware of Fourth Amendment research cited in this petition, that the entire subject of bad faith activities on the part of the IRS has arisen.

W H E R E F O R E petitioner believes that what is presented here is so substantial as to require this Honorable Court to order briefs on the merits and oral arguments to review not only the action of the courts below, but the research herein cited, he prays that a Writ of Certiorari will issue.

Most Respectfully Submitted,



Petitioner pro se

The 24 of February, 1981

AFFIDAVIT pursuant to Rule 28.5(c)

Richard Schwallier after being duly sworn, deposes and says that he served the required number of copies of his Petition for Certiorari upon:

The Solicitor General (4 copies by air mail)
U.S. Department of Justice
Washington, D.C. 20530
Attention M. CARR FERGUSON

Aquinas College Credit Union (3 copies)
Manager John Gardella
1607 Robinson Road
Grand Rapids, Michigan 49506

by placing said documents into sealed packages with sufficient first class postage affixed thereon and depositing them into the U.S. Mails located in Grand Rapids, Michigan.

Dated : February 24, 1981

Richard Schwallier
17161 40 th Avenue
Conklin, Michigan 49403

Subscribed and sworn to before me a Notary Public:

MARCIA L. MANCEWICZ
Notary Public, Kent County, MI
My commission expires Sept. 26, 1982

My commission expires:

APPENDIX

No. 80-1288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA AND ROBERT L. WALKER, IRS SPECIAL AGENT Petitioners-Appellees,	)	
v.	)	F I L E D
	)	DEC 1 1980
	)	JOHN P. HEHMAN,
AQUINAS COLLEGE CREDIT UNION, Respondent	)	Clerk
and	)	
RICHARD L. SCHWALLIER, Intervenor-Appellant	)	O R D E R

BEFORE: BROWN, KENNEDY and MARTIN, Circuit Judges

Upon consideration of petitioners-appellees' motion to dismiss and the response submitted in relation thereto,

It is determined that this Court lacks jurisdiction to entertain this appeal because the party against whom the summons was issued under 26 U.S.C. § 7602 has fully complied with the summons which thus deprives this Court of jurisdiction as there is no case or controversy to address in this appeal. DeFunis v. Odegaard, 416 U.S. 312, 316 (1975). Appellant's attempt to establish a case or controversy by attacking the constitutionality of the enforcement power granted to the Internal Revenue Service under 26 U.S.C. §7602 fails to raise a substantial question as it has been unequivocally settled that this section properly

authorizes the issuance of a summons in an investigation that is likely to lead to civil liability as well as to criminal prosecution. Couch v. United States, 409 U.S. 322 (1973); Donaldson v. United States, 400 U.S. 517 (1971); United States v. Joesph, 560 F.2d 742 (6th Cir. 1977); United States v. Cleveland Trust Co., 474 F.2d 1234 (6th Cir.), cert. denied, 414 U.S. 866 (1973). It is also beyond cavil that a summons directed to a third party bank or credit union does not violate the Fourth Amendment rights of a depositor under investigation since the records belong to the financial institution and not to the depositor. See United States v. Miller, 425 U.S. 435, 440-444 (1976); United States v. Weingarden, 473 F.2d 248, 256 (10th Cir. 1979) and cases cited therein. Further determining that oral argument is not needed in this case, Rule 34, Federal Rules of Appellate Procedure,

It is ORDERED that the motion to dismiss be and herely is granted and this case is hereby remanded to the district court so as to allow it to vacate the enforcement order. Great Western Sugar Co. V. Nelson, 442 U.S. 92 (1979).

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, AND
ROBERT L. WALKER, IRS Special Agent
Petitioners,

v. G79-28 Misc.

AQUINAS COLLEGE CREDIT UNION,
Respondent.

ORDER

This matter is before the court on the Report and Recommendation of the Magistrate following hearing on October 17, 1979.

After a review of the file and the Report and Recommendation of the Magistrate, I hereby adopt the findings of the Magistrate that the investigation of the taxpayer in this action is for a legitimate purpose, that the information sought is for a relevant purpose in that investigation, that the information sought is not in the possession of the Internal Revenue Service, that no recommendation for prosecution of the taxpayer has been made by the Internal Revenue Service, and that the administrative steps required by the Internal Revenue Service Code to obtain such information have been followed.

Therefore, IT IS ORDERED that the respondent comply

with the terms of the summons heretofore served upon it.

Dated: February 15, 1980.

(signed)

Noel P. Fox, Senior Judge

United States District Court

Western District of Michigan

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

(stamped) Gerald H. Liefer, Clerk

By (signed) E. Kloostra

Deputy Clerk

Date Feb 19 1980